

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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<b>Tracy Rexroat,</b>	)	
	)	No. <b>CV 11-1028-PHX-PGR</b>
Plaintiff,	)	
	)	
vs.	)	Phoenix, Arizona
	)	February 22, 2012
<b>Arizona Department of</b>	)	11:31 am.
<b>Education, et al.,</b>	)	
	)	
Defendants.	)	
	)	

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BEFORE: THE HONORABLE PAUL G. ROSENBLATT, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DISCOVERY CONFERENCE CALL

**TELEPHONIC APPEARANCES:**

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Hall & Chelle

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Transcript Prepared by Computer-Aided Transcription

1 (Proceedings begin at 11:31 a.m.)

2 THE CLERK: Civil case 11-1028, Tracy Rexroat versus  
3 Arizona Department of Education and others. This is the time  
4 set for discovery conference call.

5 Please announce your presence for the record.

11:31:42

6 MR. HALL: Cameron Hall and Michael Zoldan on behalf  
7 of Plaintiff, Tracy Rexroat.

8 MS. BACALZO: Good morning, Your Honor, this is  
9 Rachel Bacalzo with the Arizona Attorney General's Office  
10 appearing on behalf of the Defendant, State of Arizona  
11 Department of Education.

11:31:53

12 THE COURT: Well, good morning, Counsel.

13 This is the time fixed by the Court for a resolution  
14 conference on this discovery dispute.

15 And what's the problem?

11:32:08

16 MR. HALL: Yes, Your Honor. This is Cameron Hall.

17 And our issue at this point is we want to keep it as  
18 limited in scope as possible, and as simple as possible.

19 We've requested a number of documents, and we've  
20 requested them under Rule 34(a)(1)(A) and electronic ESI,  
21 electronically stored information. The respondent has -- the  
22 State has instead produced everything in pdf form. And, in  
23 fact, instead of providing ESI, in a number of instances has  
24 gone in and pulled up the properties of some of their  
25 electronic documents and given us screen shots of the

11:32:27

11:32:55

1 properties of those documents and not the ESI itself.

2 And that is, we believe, a clear violation of Rule 34.  
3 And, in fact, there's a recent January 17, 2012 decision that's  
4 almost identical from Judge Martone. And the defendants in  
5 that case were similarly providing screen shots, and 11:33:22  
6 Judge Martone went through an analysis and ordered that they  
7 provide the actual ESI, as requested. And, Your Honor, we  
8 would ask the same thing.

9 MS. BACALZO: Your Honor, this Rachel Bacalzo, there  
10 are actually two matters. One is as addressed by Mr. Hall, and 11:33:39  
11 then the defendant also has a matter that I would like to  
12 present to the Court, specifically plaintiff's failure to  
13 comply with Rule 26 and Rule 33. We can address that later.

14 But turning to Mr. Hall's request, this issue was  
15 brought to me as a failure to comply with Rule 34. The State 11:34:00  
16 has more than complied with Rule 34.

17 Specifically, we received a request for production of  
18 documents, and based on our objections and responses we've  
19 produced over 580 pages of paper, 200 of which were produced in  
20 native format. 11:34:23

21 As Your Honor may recall from our discussion on the  
22 record at the Rule 16 conference, there are some very  
23 significant challenges for the Department of Education to  
24 produce all documents in native format. And I provided  
25 Your Honor and Mr. Hall copies of what -- the best version we 11:34:39

1 can give is native format, and that included the properties.  
2 That's all we can do. ADE does not track any changes to  
3 documents.

4 So as I sit here today, Your Honor -- and I told  
5 Mr. Hall this during our conference last week -- I do not know  
6 how he feels that ADE has not fully complied with our  
7 obligations under Rule 34.

11:34:56

8 We started going through the request. We got to the  
9 second request, and Mr. Hall said, I don't think we're getting  
10 anywhere, we need to call the Court. And I said, well, I don't  
11 understand what the objection is. I'm telling you we produced  
12 everything. And I'm going to tell the Court that I don't think  
13 we have conferred in good faith under Rule 37.

11:35:13

14 So as I'm sitting here today, based on everything I've  
15 communicated to Mr. Hall and to the Court on this  
16 electronically stored information issue, it's difficult for me  
17 to respond because I do not know what specifically he feels we  
18 have not provided.

11:35:35

19 For example, he asked for the personnel file. He got  
20 the personnel file. Rule 34 requires us to produce documents  
21 as they're kept in the normal course of business. That's  
22 specifically in the Rule, Section (b)(2)(E) roman numeral --  
23 letter (i), excuse me. So we do not keep an electronic copy of  
24 the personnel file. That's why they got a paper copy.

11:35:51

25 But to the extent we could provide information in

11:36:14

1 native format, we did that. If Mr. Hall is not satisfied with  
2 the form, that's the best we can do. And I've worked  
3 extensively with our IT staff. And as I showed the Court, the  
4 best we can do is provide the properties.

5 And I also said there is no relevance to that. It 11:36:35  
6 tells you basically who copied the document to a disk. I  
7 objected to going through all kinds of work trying to find  
8 electronic versions of documents, because it wasn't going to  
9 provide any relevant information and it would be very costly  
10 for the State. 11:36:55

11 So it's difficult to respond to this request not  
12 knowing specifically what he feels that we have not produced.  
13 I've asked for that information and I still do not have it.

14 On page 11 of the transcript from the Rule 16  
15 conference, Your Honor said specifically that you were 11:37:12  
16 declining to issue a blanket order for ADE to produce all  
17 information in native form -- all documents in native format.  
18 And you said to Mr. Hall that he should be specific about any  
19 requests for electronic information. And I think that that is  
20 appropriate. I've tried to ask Mr. Hall for that as well. 11:37:36

21 We feel that we've done -- more than complied with  
22 Rule 34, because even though our official copy of documents is  
23 kept in paper form, where we could we went in electronically  
24 and provided a copy on a disk. And as I mentioned, with our  
25 responses and objections to the Rule 34 request, 200 of the 500 11:37:57

1 pages produced at that time were in native format.

2 MR. HALL: Your Honor, if I could respond briefly.  
3 That's not entirely accurate.

4 And as an initial matter, the call -- the meet and  
5 confer and the intent to resolve this in good faith lasted 11:38:19  
6 approximately 30 minutes. And it took that long to get through  
7 not even a full two RFPs.

8 And the issue for us is we may try -- we may have to  
9 come back on some of the specific objections the State has  
10 asserted. But at this point all we're asking for is the 11:38:39  
11 electronically stored information, ESI, that they're obligated  
12 to provide to us under Rule 34.

13 And the disk we received did not have 200 documents on  
14 it. It may have 200 pages. I really doubt that as well. It  
15 has 28 files in five different folders. So we received a sum 11:39:00  
16 total of 28 individual e-mails or word documents as ESI, and  
17 the rest of it we're simply told it's not relevant.

18 I've frankly never had that argument made before that  
19 the ESI is not relevant so we just don't get it.

20 THE COURT: Wait, wait, wait, wait, wait, I have some 11:39:28  
21 questions.

22 MR. HALL: Yes, Your Honor.

23 THE COURT: First of all, she's just -- counsel just  
24 said that the paper file -- the personnel file is not held  
25 electronically. 11:39:38

1 Did I understand that correctly?

2 MS. BACALZO: Yes, Your Honor.

3 THE COURT: And you have that, Counsel; correct?

4 MR. HALL: Your Honor, I don't -- I don't think that's

5 entirely accurate. The discovery request is not limited just 11:39:46

6 to the personnel file. It would also include e-mails that went

7 back and forth. The HRAS system, the payroll system is another

8 issue. These documents certainly exist or existed in the

9 near -- in the very near past in electronic format. They

10 didn't just spring into life as paper. 11:40:12

11 And the very mutation of that document over time, the

12 transmittal of it between different individuals and

13 departments, that you just cannot look at that -- you lose all

14 of that information in a paper document. And that's why the

15 ESI I believe is critical here, and the very purpose of 11:40:33

16 Rule 34, as we've cited to.

17 THE COURT: I think you're both talking about apples

18 and oranges, as near as I can tell.

19 MS. BACALZO: I agree, Your Honor.

20 THE COURT: First of all, this is a pay case. And the 11:40:49

21 plaintiff alleges that she's subject to unlawful gender

22 discrimination because her male counterparts received higher

23 salaries for the same work. So the defendant's position is

24 that that's not exactly true, that she -- some males and

25 females receive higher salaries than she does, and she receives 11:41:17

1 a higher salary than some other females and one male do.

2 It seems to me that the discovery needs to concern,  
3 who are the employees, how much are they paid, what is their  
4 responsibility, and where did the discrimination take place?  
5 And it seems like a rather simple factual background to me,  
6 Counsel.

11:41:41

7 What is all these e-mails that you're talking about?

8 MR. HALL: Your Honor, we agree with Your Honor as far  
9 as the focus of the case. How the salary decisions are  
10 reached, though, is very much going to play into the case and  
11 the evidence that we put on.

11:42:01

12 So, for example, a committee can interview a female  
13 candidate, there's a range of salaries that they can offer to  
14 her. And there's then e-mail traffic where they talk about the  
15 candidate. There's documents where they are drafting an offer  
16 letter and changing the amount that they're going to offer.  
17 And that stream of ESI is going to be critical to obtain and  
18 compare to the stream of ESI when a male candidate is in a  
19 similar position for the same job.

11:42:21

20 So it's not simply enough for us to get the final  
21 offer letter that went out to each of the male and female  
22 employees and candidates, and we just have to take that and  
23 we're stuck with nothing else.

11:42:40

24 It's critical to our case, Your Honor, to be able to  
25 look at the comments and the reasonings that went into those

11:43:00



1 decisions, and that support our opinion -- our position is that  
2 do not support the higher salaries for some of these male  
3 employees.

4 THE COURT: So what you seek are e-mails going back  
5 between the people that fix the salaries and how they  
6 determined what that salary would be, which may show that they  
7 said she's a woman and, therefore, she doesn't deserve that  
8 salary. Is that basically what you're looking for?

11:43:16

9 MR. HALL: Well, yes, Your Honor, that's one slice of  
10 it.

11:43:36

11 And, for example, the range of salary can be based  
12 on -- if there's some unusual reason in the person's  
13 background, if they had a prior job that paid a very high  
14 salary, under the State under the applicable range could offer  
15 them a higher starting salary.

11:43:53

16 It would be very relevant if the e-mail traffic and  
17 the documents, the ESI documents, show that for male candidates  
18 they just accept on face value when somebody says, I made 100  
19 grand in my last job, they just accept that on face value, and  
20 females they really go in and scrutinize the resume and the  
21 application. That's not going to show up anywhere except in  
22 the e-mail traffic and in the documents maintained on the  
23 relevant personnel's local computers.

11:44:12

24 THE COURT: Okay. Miss Bacalzo --

25 MS. BACALZO: Yes, Your Honor.

11:44:27

1 THE COURT: Wait, wait, wait, wait, wait. How can  
2 they get that information?

3 MS. BACALZO: He has it. He has the information of  
4 how the higher salary was calculated. He didn't ask for that,  
5 but we provided that. We also provided the salary history for 11:44:40  
6 Tracy Rexroat, the plaintiff, and her counterparts. He doesn't  
7 have just the offer letter. We have -- as a public entity we  
8 have an obligation to document how salaries are arrived at, as  
9 well as any changes to salary. We don't do that typically by  
10 e-mail. He has documents for each of those individuals, as 11:45:03  
11 well as the detailed chart of salary history.

12 Changes in salary are sometimes for some employees  
13 driven by acts of the legislature. So when he says he wants  
14 this e-mail traffic, first of all, he never requested that.  
15 But what we have disclosed are the relevant documents and the 11:45:22  
16 witnesses who came to arrive at the initial hire salary for  
17 Tracy Rexroat. He's had that for a long time. And then also  
18 for each of her counterparts. What went into calculating the  
19 initial hire salary. All of those documents are forms that ADE  
20 by practice continues to follow. 11:45:49

21 So when he keeps referring to e-mail traffic, I do not  
22 know what he is referring to. We don't typically hire people  
23 with e-mail exchanges.

24 However, we have produced e-mails between one of the  
25 witnesses and Miss Rexroat regarding the hire process. 11:46:10

1           So we have searched our computers. I have had  
2 everyone in Miss Rexroat's chain of command, and this is since  
3 the outset of this case, and HR, search their personal  
4 computers, some of them have searched them several times, for  
5 any documents that exist on their computers but do not exist in 11:46:31  
6 the paper files.

7           We are very confident that we have produced all  
8 relevant documents, and that we're not withholding anything  
9 relevant to this issue.

10           And you're absolutely right, Your Honor, this is a 11:46:46  
11 straightforward salary case. We don't make salary decisions  
12 based on an e-mail string. We have to cut paper. Those  
13 paper -- that paper trail has been produced. And the relevant  
14 documents really are, when somebody is hired their salary  
15 history. Those documents, Mr. Hall has. As well as a chart 11:47:08  
16 that one of the ADE employees prepared at my direction. And  
17 that was not ever something he asked for.

18           THE COURT: Okay. Mr. Hall, what's wrong with all  
19 that?

20           MR. HALL: Your Honor, we don't have that. We have 11:47:26  
21 nine e-mails. That's what we have for e-mail traffic.

22           And maybe I'm going out on a limb here, but I find it  
23 hard to believe that a committee gets together, interviews a  
24 bunch of candidates, and there's zero e-mail traffic about it.  
25 What the State is arguing is all we did is their final product. 11:47:46

1 We get their version of what happened as they produce it in a  
2 final paper document.

3 And we want to get access to -- for behind the scenes  
4 part of what went into the making of that, and the comments and  
5 the questions, and all of the things that go into normal  
6 corporate communications.

11:48:06

7 By way of comparison, Your Honor, we produced to the  
8 State nearly 700 separate electronic documents from a single  
9 plaintiff. And the vast majority of those were e-mails that  
10 are relevant and requested. And we located this because we  
11 have one side of them from our client. But the State is saying  
12 that the other side doesn't exist.

11:48:31

13 MS. BACALZO: You know, if we had discussed this last  
14 week I might have a response. I have no idea what Mr. Hall is  
15 referring to.

11:48:50

16 We have produced all of the paper that's been cut  
17 regarding salaries for Miss Rexroat and for her counterparts.  
18 What Mr. Hall is -- has produced is 3,000 pages. Some have to  
19 do with salary. And there's a whole lot of stuff that has no  
20 relevance to the lawsuit, like adoption papers of a Chinese  
21 baby. It's well before Miss Rexroat came to be a State  
22 employee. There was a lot of just junk in these thousands of  
23 pages.

11:49:11

24 So, again, I've invited Mr. Hall since September, if  
25 you can identify something specific that you feel we have not

11:49:32

1 produced, please tell me so I can address it with my client.

2 But we have searched manually through paper files, through the  
3 computer systems of anybody who would have been involved.

4 He's saying, well, I think there must have been some  
5 e-mails. All right, well, I don't know exactly what you're 11:49:53  
6 talking about. We've produced those hire documents. I mean,  
7 when we hire somebody we've got certain documents about the  
8 successful candidate.

9 So I don't know what more we can do. The employees  
10 have searched their computers multiple times. I think this is 11:50:09  
11 a fishing expedition. I don't even think Mr. Hall knows what  
12 he is asking for.

13 MR. HALL: I certainly do.

14 And, Your Honor, the representation here is that  
15 the -- there's been a legal hold that's been put in place for 11:50:26  
16 all documents, including ESI, from the State. And that all of  
17 the employees that would have a -- potentially have relevant  
18 or -- relevant evidence or evidence that would lead to the  
19 discovery of relevant evidence have gone in and searched their  
20 computers and they've looked at the servers and they are 11:50:48  
21 confident that they have only 28 responsive documents in ESI in  
22 native format, then if we can get a verification of that in  
23 writing and a description of what they did, what search terms,  
24 what search modality, what the State did to go out and look for  
25 ESI. 11:51:10

1 MS. BACALZO: I feel like Mr. Hall has just  
2 represented what I said, I think the sun rose at 2:00 o'clock  
3 this morning. I mean, I outlined what we have done.

4 We keep files and paper for very good reason. Based  
5 on our current system it costs \$1 million to maintain the 11:51:29  
6 information that employees are inputting into the system on two  
7 servers, and that's just for three years. And those servers  
8 are full.

9 He mentioned search terms. That first request that we  
10 do a search term, search of our servers, was first made last 11:51:46  
11 week. It was never part of the request for production.

12 But it's difficult because this issue keeps moving.  
13 If we're going to stick with the Rule 34 request, which is what  
14 was presented to me, the issue is, what have we failed to  
15 produce that has been requested? 11:52:08

16 I have represented to Your Honor that we have looked  
17 for responsive information. That process started months and  
18 months before we ever got actual discovery requests from  
19 Mr. Hall. We were in the process of identifying what relevant  
20 categories of information might be out there, capture it and 11:52:27  
21 preserve it, so that we can access it if and when that was  
22 needed.

23 That process continues to this day, and we have  
24 produced all the relevant information regarding salaries and  
25 duties. He has that information. 11:52:45

1           So I'm afraid without a specific request, what are we  
2 looking for, I don't know that my client can do any better, nor  
3 could I ask my client to search -- searching for a needle in a  
4 haystack.

5           THE COURT: Okay. That's all.

11:53:03

6           Here's the situation: The plaintiff is going to get,  
7 in one form or another, everything that it's entitled to get,  
8 either electronically or in paper form.

9           Now we know that if the defendant withholds  
10 information or evidence, the ax will come down very severely.  
11 By the same token, the plaintiff is not entitled to have the  
12 Government reform its computer system and provide everything  
13 that might be in there just to satisfy electronic stored medium  
14 information documentation or discovery.

11:53:21

15           So first of all, you haven't fully conferred with each  
16 other.

11:53:45

17           Secondly, you're still going to have to come down to  
18 specific requests and why they are reasonable, why they are  
19 relevant, before the Court's going to enter any order on this  
20 particular issue. And the Court isn't going to do that until  
21 after you've conferred, after you've tried to exchange more  
22 information, tried to determine what each other believes that  
23 you need.

11:54:04

24           And then, if you haven't gotten it by that time,  
25 Mr. Hall, then you're going to have to file a motion for

11:54:17

1 production, motions to compel, or whatever you believe is  
2 appropriate under the rules.

3 But you can't make the State turn over their computers  
4 to you while you search through them looking for something that  
5 may be relevant to this particular issue, which is a narrow  
6 issue. 11:54:34

7 MR. HALL: Yes, Your Honor. We're not looking  
8 for -- asking for that at all. And we certainly don't want  
9 more information to sort through than is going to be useful for  
10 us, because it would be a waste -- not only a waste of our  
11 time, but our client's time as well. 11:54:52

12 What we're looking for are the specific requests I've  
13 propounded and the ESI that comes along with that. And the  
14 response we consistently every time get from the State is,  
15 well, you tell us what specific document you want in ESI and  
16 we'll go look for it on a document-by-document basis. And that  
17 frankly just turns Rule 34 upside down and on its head. 11:55:10

18 It's not -- we don't know what documents exist. We  
19 know the categories --

20 THE COURT: Well, you have to know something, because  
21 you filed a Complaint. And that had to be based on something  
22 other than the fact that the plaintiff looked around and saw  
23 some people that were getting paid more than she was. 11:55:30

24 MR. HALL: Well, yes, Your Honor, and we do. And as I  
25 mentioned, we produced nearly 700 separate electronic 11:55:43



1 documents.

2 THE COURT: Well, what does the baby have to do  
3 with --

4 MR. HALL: Well, I believe what she's referring to is  
5 probably some e-mail traffic that was going back and forth and  
6 had to do with a travel issue and --

11:55:53

7 THE COURT: So you want all this e-mail traffic that  
8 the State may have?

9 MR. HALL: Just as it relates to the claims in this  
10 case, Your Honor.

11:56:07

11 THE COURT: Well, I've made my ruling. You need to  
12 confer. And at that -- after your conferring and production  
13 and understanding of what each other needs, then you're going  
14 to have to file a motion.

15 MR. HALL: Okay. Thank you, Your Honor.

11:56:22

16 MS. BACALZO: Your Honor, on the issue for the  
17 defendant, very briefly, we served some discovery requests on  
18 the plaintiff back in September. We granted two extensions.  
19 The last deadline for the initial disclosure statement and  
20 discovery responses was December 5th. There have been some  
21 supplements. We still do not have the calculations, amounts  
22 and documents for each category of Miss Rexroat's damages, as  
23 well as responses to interrogatories 1 and 8.

11:56:40

24 When I brought this issue to Mr. Hall's attention, he  
25 said he was in the process of preparing a supplemental

11:57:03

1 disclosure. I said that her deposition is at least currently  
2 set for March 6, when are we going to get it? And he said,  
3 when you provide me the information you're supposed to provide  
4 me.

5 As I think Your Honor knows, under Rule 26 a party may 11:57:16  
6 not hold hostage a disclosure required under Rule 26.

7 THE COURT: What about that, Mr. Hall?

8 MR. HALL: That's not accurate, Your Honor.  
9 We -- this issue was raised at the very end of the meet and  
10 confer that I had requested about ESI. We had no chance to 11:57:32  
11 discuss it in any substantive way at all. And, in fact, as I  
12 told Miss Bacalzo -- as I told opposing counsel at the time, we  
13 were objecting to even bringing this up at -- during this call  
14 because we had no chance to discuss it and try to resolve it at  
15 all. 11:57:55

16 THE COURT: Well, you better resolve that, because  
17 you've got a deposition coming up and they need that  
18 information. If it has to be supplemented, I suppose that's  
19 another reason. But you have a deadline and you didn't meet  
20 that deadline. 11:58:08

21 MR. HALL: Your Honor, we did provide responses. We  
22 provided the initial disclosure. The State is just unhappy  
23 with the amounts that we're providing. We're still  
24 supplementing. We've already had a supplemental disclosure.  
25 And we're getting everything out as timely and as fast as we 11:58:23

1 can.

2 THE COURT: Well, confer on this matter and get it  
3 resolved.

4 MR. HALL: Yes, Your Honor.

5 THE COURT: That's all.

11:58:30

6 (Proceedings concluded at 11:58 a.m.)

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C E R T I F I C A T E

I, CANDY L. POTTER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 27th day of February, 2012.

s/Candy L. Potter  
Candy L. Potter, RMR, CRR